

Office-Supreme Court, U.S.
FILED

OCT 14 1983

ALEXANDER L STEVENS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

ANDREW BERES, et al.

Petitioners,

vs.

HOPE HOMES, INC.

and

CITY OF TALLMADGE,

Respondents.

RESPONDENT'S OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Lee C. Davies, Counsel of Record
Ferbstein and Davies
730 Centran Building
Akron, Ohio 44308
(216) 762-9851
Counsel for Respondent,
Hope Homes, Inc.

TABLE OF CONTENTS

Jurisdiction	1
Statement of the Case	3
Reasons for Denying the Writ . .	5
1. The decision below was limited to contractual interpretation under Ohio law and did not adversely affect the constitutional rights of the petitioners.	5
2. The deinstitutionalization of developmentally disabled individuals is a desirable practice and should be encouraged as a matter of public policy.	10
Conclusion	11

TABLE OF AUTHORITIES

Cases

<u>American Railway Express Company v. Lucius P. Levee</u> (1923) 262 U.S. 19, 68 L. Ed. 140, 44 S. Ct. 8	2
<u>Andrew W. Mellon v. Thomas E. O'Neil</u> (1927) 275 U.S. 212, 73 L. Ed. 245, 40 S.Ct. 62	3
<u>Whitney v. California</u> , 274 U.S. 357, 360, 71 L. Ed. 1095, 1099, 47 S.Ct. 641....at 214	3
<u>Central Land Company v. John B. Laidley</u> (1895) 159 U.S. 103, 40 L. Ed. 91, 16, S. Ct. 80	9

Constitution

United States Constitution:	
Fifth Amendment	5
Fourteenth Amendment	5
Article I, Section 10	5,10

Statutes

28 U.S.C., Section 1257(3)	1, 3
--------------------------------------	------

JURISDICTION

The Petitioners have invoked the jurisdiction of this Court under 28 U.S.C., Section 1257(3). This statute provides in pertinent part:

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

...

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held for authority exercised under, the United States.

Respondent, Hope Homes, Inc., maintains that Petitioners have failed to properly invoke the jurisdiction of this Court for the reason that the constitutional issues raised by

Petitioners to this Court were not drawn into question in the state proceedings and the final judgment sought to be appealed to this Court does not involve a review of any federal question. Because the Supreme Court of Ohio denied Petitioners application for writ of certiorari, and therefore, did not rule on the merits of this case, the decision sought to be reviewed to this Court is that of the Court of Appeals of Summit County, Ohio. American Railway Express Company v. Lucius P. Levee (1923) 263 U.S. 19, 68 L. Ed. 140, 44 S. Ct. 8.

It can readily be seen from the review of the Court of Appeals for Summit County, Ohio [Jurisdictional Statement, Petitioners, p. A1-A9] that no constitutional issue was drawn in question and decided by the appellate court.

This Court stated in Andrew W. Mellon v. Thomas E. O'Neil(1927) 275 U.S. 212, 73 L. Ed. 245, 40 S. Ct. 62 that:

It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review has been presented in and expressly or necessarily decided by such state court. Whitney v. California, 274 U.S. 357, 360, 71 L. Ed. 1095, 1099, 47 S. Ct. 641....at 214.

Therefore for the above reasons, it is evident that the Petitioners have failed to raise a Constitutional issue to be decided by the Ohio courts and has not properly invoked this Court's jurisdiction pursuant to 28 U.S.C. Section 1257(3).

STATEMENT OF THE CASE

Respondent, Hope Homes, Inc., is in substantial agreement with the Statement of the Case as set forth in Petitioners'

brief. The only exception to the Statement of the Case as set forth by Petitioners is to the characterization of the family home by Petitioners. Respondents state that the family home is a permanent residential facility for not more than eight (8) developmentally disabled individuals. These individuals interact on a daily basis as a family and participate on a daily basis in various household chores including cleaning and cooking. All individuals leave the house during the day and go to either a school or a sheltered workshop. The Petitioners in their Statement of the Case have utilized the statutory definition of family home in its explanation, but has failed to adequately set forth the reality of the situation which was reviewed by the lower courts.

REASONS FOR DENYING THE WRIT

1. THE DECISION BELOW WAS LIMITED TO CONTRACTUAL INTERPRETATION UNDER OHIO LAW AND DID NOT ADVERSELY AFFECT THE CONSTITUTIONAL RIGHTS OF THE PETITIONERS.

Petitioners state in their first reason for granting the writ of certiorari that the Ohio courts have destroyed a restrictive covenant for property use, in violation of (1) the Due Process Clause and Fifth Amendment prohibition of taking property without just compensation, applied to the states through the Fourteenth Amendment; and (2) the prohibition of impairment of contract found in Article I, Section 10 of the United States Constitution. It is Respondent's position that the Ohio courts have merely interpreted the meaning of a private land restriction and that the restriction remains fully intact. Thus, there has been no denial of

any constitutional rights.

In the trial court, the Petitioners sought a Declaratory Judgment as to the meaning of the plat restrictions contained on the subject property. Specifically, it was seeking a declaration of the terms "business", "private residence purpose" and "single family residence". At the trial level, this Respondent successfully maintained that the above words, as used in the plat restrictions, had more than one meaning and were susceptible to construction. The Ohio courts merely utilized the well established rules of construction in the State of Ohio to construe the plat restrictions. This construction was adverse to the contentions of the Petitioners, however, the entire plat restriction remained intact.

Petitioners maintained that the Ohio

Courts radically transformed the ordinary meanings of "family" and "business" and that this transformation constituted a taking of their property right to restrict the land within their allotment to a private residential single family use. The instant matter does not involve a situation where the State of Ohio has mandated that a family home be placed in this subdivision. Nor is the instant matter a situation where the Ohio courts have revised terms of a private contract to conform with subsequent state legislation. This appeal has been brought only because the Petitioners in the first instance were unable to prove before the trial court that the terms sought to be interpreted had only one meaning or that the term sought to be interpreted should be interpreted in a manner consistant with Petitioners' arguments. The

Petitioners failed at the trial court only because they failed to prove their position.

Petitioners have not been denied any property rights for which they should have been compensated. The private plat restrictions remain intact and no business, manufacturing or other commercial venture may be instituted in the subdivision. The neighborhood, as before, will remain a single family residential neighborhood.

Furthermore, Petitioners' right to contract has not been impaired, despite the contentions of the Petitioners that the courts utilized municipal zoning provisions to abrogate Petitioners' contractual obligations. The lower courts did use the municipal zoning provisions as an aid in interpreting the words at issue. However, it is evident from the

lower courts' opinions that the decisions were not based upon the utilization of the municipal zoning provisions. Further, there has been no violation of the Contracts Clause of the Constitution for the reason that the complained infirmity is a judicial decision. In Central Land Company v. John B. Laidley(1895) 159 U.S. 103, 40 L. Ed. 91, 16 S.Ct. 80, this Court stated:

In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only. At 109, 94.

Thus, because the alleged violation is truly a matter of judicial construction and not by virtue of the application of a state statute or ordinance, there can be no violation of

Article 1, Section 10 of the United States Constitution.

2. THE DEINSTITUTIONALIZATION OF DEVELOPMENTALLY DISABLED INDIVIDUALS IS A DESIRABLE PRACTICE AND SHOULD BE ENCOURAGED AS A MATTER OF PUBLIC POLICY.

Since the days of the common law, restrictions on the alienability and free use of ones own land has been closely scrutinized and held in disfavor. The integration of developmentally disabled individuals into society and into the community is a desirable goal, in that it will permit a developmentally disabled individual to obtain his or her full potential and enjoy life as fully as possible.

While it is conceded that restrictive covenants must be upheld where they are valid and not against public policy, this Respondent maintains that in the instant situation, public policy considerations

aside, the court properly interpreted the provisions of the instant restrictive covenants in view of the evidence presented to it.

CONCLUSION

As previously stated in its Statement of Jurisdiction, Respondents contend that Petitioners have failed to properly invoke the jurisdiction of this Court in that a federal issue was not drawn in question in the decision of the lower court. Further, should this Court find that jurisdiction was properly invoked, Respondents maintain this matter involves no significant constitutional issues, but instead solely involves the judicial interpretation of a contract under the laws of the State of Ohio. For these

reasons, a writ of certiorari should be denied.

Respectfully Submitted

LEE C. DAVIES
Counsel of Record
Ferbstein and Davies
730 Centran Building
Akron, OH 44308
(216) 762-9851
Counsel for Respondent
Hope Homes, Inc.